1-14-2009

State v. Patterson Appellant's Brief Dckt. 35463

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35463
	)	
v.	)	
	)	
DALE ERNEST PATTERSON,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

Pursuant to a plea agreement, Dale Patterson pled guilty to two counts of delivery of a controlled substance (methamphetamine), as well as a sentencing enhancement (five years fixed) under I.C. § 37-2739B(b)(1) for having a prior conviction for a similar offense. The district court interpreted I.C. § 37-2739B as creating a true mandatory minimum sentence and, therefore, it ruled that it had no discretion to suspend the five year fixed sentence, or retain jurisdiction over Mr. Patterson. Ultimately, it imposed two concurrent unified sentences of fifteen years, with five years fixed. The district court explained that, in its view, the fixed portion of those sentences was required under section 37-2739B but, even if such a mandatory minimum did not exist, it would have exercised its discretion in favor of the sentence ultimately given.

Mr. Patterson appeals. He argues first that the district court abused its discretion by imposing, and ordering into execution, the sentence that it did. As part of this argument, he contends that, given the record in this case, the district court should have granted him an opportunity to earn a chance at probation by placing him in the retained jurisdiction ("rider") program. Mr. Patterson also argues that the district court erred in concluding that a rider was not a legal sentencing option in this case.

Mr. Patterson respectfully requests that this Court vacate his sentence and remand his case with an order that he be granted a rider. Alternatively, he requests that this Court reduce the indeterminate portion of his sentence or remand his case for a new sentencing hearing.

Statement of the Facts and Course of Proceedings

Dale Patterson is a drug addict. (Interviewer's Assessment, p.4 (Mar. 13, 2008).) He started drinking and smoking marijuana when he was only ten years old. (Presentence Investigation Report (*hereinafter,* PSI), p.9.) As a teen, Mr. Patterson smoked marijuana "all the time," began using cocaine *heavily* and, in his late teens, even started using methamphetamine. (PSI, p.9.)

In 1989, when he was 22 years old, Mr. Patterson completed a 28-day residential treatment program at ARA House in Idaho Falls for his cocaine addiction. (Interviewer's Assessment, pp.1, 2, 3 (Mar. 13, 2008).) It appears that that program helped Mr. Patterson overcome his cocaine addiction; however, he did continue to use marijuana and, obviously, methamphetamine after completing the program. (*See* Interviewer's Assessment, pp. 2, 4 (Mar. 13, 2008).)

In 2001, at the age of 35, Mr. Patterson was convicted of a single count of possession of a controlled substance with intent to deliver. (PSI, p.5.) The record does not reveal what that controlled substance was, but one would guess that it was methamphetamine. Mr. Patterson received a unified sentence of seven years, with three years fixed for that offense. (PSI, p.5.) After serving his fixed time, Mr. Patterson was paroled in August of 2003. (PSI, p.5.) He stayed clean at least until he was discharged from parole in September of 2005. (PSI, p.5; *see* PSI, p.9.)

Sadly, in 2007, after six years of sobriety, including more than a year where he was not supervised by the State in any way, Mr. Patterson relapsed and began using methamphetamine again. (PSI, pp.3, 9, 10.) Immediately, his methamphetamine use became a daily habit and, before long, he was injecting it intravenously. (PSI, p.9.) In

order to support his methamphetamine addiction, Mr. Patterson then began to sell drugs. (Sent. Tr., p.34, Ls.19-21; PSI, p.3.)

On October 4 and 12, 2007, Mr. Patterson sold small amounts (2.5 grams and 2.3 grams, respectively) of methamphetamine[1] to a confidential informant and/or an undercover police officer. (R., pp.18-19; Plea Tr., p.11, L.7 – p.13, L.5.)

On January 14, 2008, Mr. Patterson was charged with two counts of delivery of a controlled substance (methamphetamine). (R., pp.13-16.) As to each of the two counts, he was also charged with two separate sentencing enhancements—one for delivering methamphetamine within 1000 feet of a school (I.C. § 37-2739B(b)(2)), and one for having been previously convicted of delivery of a controlled substance (I.C. § 37-2739B(b)(1)).

After Mr. Patterson waived his preliminary hearing (R., pp.29, 30), he was bound over into the district court (R., p.31). The State filed its Information on February 20, 2008. (R., pp.32-35.)

At some point, Mr. Patterson's bond was reduced (R., pp.39-41) such that he was apparently able to bond out of jail on certain conditions, including the requirement that he submit to drug testing (urinalyses) three times per week. (See R., pp.48, 87; Plea Tr., p.15, L.19 – p.16, L.4.)

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[1] The amounts of methamphetamine sold were each slightly more than a "teener," a sixteenth of an ounce. City of Boise Website (*available at*<http://www.cityofboise.org/Departments/Police/DrugEducationAndResources/DrugIdentification/page5807.aspx>). It is probably safe to label a teener as a "personal use" amount, given that Mr. Patterson used an "8 ball," an eighth of an ounce, or twice as much as a teener, the last time he used methamphetamine, *i.e.*, the day he was arrested. (See Interviewer's Assessment, p.1 (Mar. 13, 2008).)

On March 20, 2008, while Mr. Patterson was out on bond, he voluntarily began attending Intensive Outpatient ("IOP") Treatment at the Walker Center in Gooding. (R., p.87; Interviewer's Assessment, p.1 (Mar. 13, 2008).) A progress report, covering the period from April 7, 2008, through May 7, 2008, indicated that, to that point, Mr. Patterson had attended all of his group sessions and actively participated in those sessions in a positive way, and was making progress toward his goal of sober living. (Walker Center Outpatient Program Monthly Progress Report (May 7, 2008).) He successfully completed the IOP program on May 28, 2008. (R., p.87.) Afterward, Walker Center staff described the progress that Mr. Patterson had made in the program, explaining that he had "internalized his motivation for remaining clean and sober," "place[d] his recovery as a top priority in his life," "expressed accountability and accepted responsibility for his actions," and "still attend[ed] treatment and [did] everything he could to be stable in his recovery" despite the ongoing distraction of his criminal case. (R., p.87.)

In the meantime, on or about May 5, 2008, Mr. Patterson entered into a plea agreement with the State. (*See* R., p.59.) Under the terms of that agreement, Mr. Patterson agreed to plead guilty to both counts of delivery of a controlled substance, as well as one of the two enhancements for having a prior drug-related conviction. (R., p.59.) In exchange, the State agreed to: (1) dismiss the second enhancement for the prior conviction, as well as both school zone-based enhancements; (2) refrain from filing a persistent violator enhancement or any additional charges relating to the search

of Mr. Patterson's camp trailer the day after he was arrested[2]; and (3) recommend a sentence of no more than fifteen years, with seven years fixed. (R., p.59.)

As noted, Mr. Patterson completed the IOP program on May 28, 2008. Thereafter, he began attending Men's Relapse Prevention, a program which presumably continued through the time of his June 16, 2008 sentencing hearing.[3] (*See* R., p.87.)

As of the time of Mr. Patterson's sentencing hearing, he had substantially complied with the terms of his release—appearing for all appointments in a timely fashion, participating in all required drug tests,[4] and testing negative for drugs and alcohol.[5] (R., p.89.) In addition to this information, the district court had before it the PSI, detailing Mr. Patterson's history of addiction, as well as some of his recent progress (*see* PSI, pp.9-10; Interviewer's Assessment (Mar. 13, 2008); Walker Center Outpatient Program Monthly Progress Report (May 7, 2008)), a letter from the Walker Center discussing Mr. Patterson's completion of the IOP program and success in treatment as of the time of sentencing (*see* R., p.87), and letters of support from his

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[2] In the search of Mr. Patterson's camp trailer, the police found "several clear baggies containing a white residue" believed by the police to be methamphetamine, a pipe containing a white residue, empty plastic bags, and certain materials and equipment that were consistent with the making of "crystal MSM, which is a cutting agent for methamphetamine." (R., pp.94-95.) When Mr. Patterson was confronted with the evidence found in his camp trailer, he admitted that an unidentified individual had attempted to bring a portable meth lab into his trailer at one point, but that Mr. Patterson had kicked him out. (R., pp.95-96.) Although Mr. Patterson admitted to making MSM, he denied ever making, or attempting to make, methamphetamine. (R., pp.95-96.)

[3] Apparently, Mr. Patterson was on a waiting list for a 28-day inpatient treatment program (*see* Plea Tr., p.13, L.9 – p.14, L.24), but it does not appear that space in that program opened up prior to his sentencing hearing.

[4] After his initial success while out on bond, the district court reduced the drug testing requirement to two times per week. (Plea Tr., p.15, L.19 – p.16, L.4.)

cousin and his daughter.[6] His cousin's letter informed the district court that Mr. Patterson is a "good father" who "loves his children very much." (Letter from Anne Dinman to Judge Bevan, p.1 (undated).) His eleven year-old daughter's[7] letter bears this out:

> I love my father with all of my heart. I miss him terribly right now. If he goes away even longer then you cannot imagine how much I'll miss him. Every time I just think about him not being with me and my family I cry. Every time I think a smidge about him then I [bawl]. . . . I really love him and I just want to be able to say my dad lives with me. . . . I love my daddy to[o] much to lose him. I need him in my life . . . . My life is so completely empty. Please don't let me [lose] him as much as I already have. . . . Please send him to rehab so he can by my superdad again. Tell him I love him with all my heart and always will . . . .

(Letter from Chelsea Patterson to Judge Bevan, p.1 (undated).)

At the hearing, Mr. Patterson offered statements from four witnesses in mitigation. (*See* Sent. Tr., p.8, L.4 – p.13, L.10.) Greg Avery, Mr. Patterson's sponsor, spoke of Mr. Patterson's success in the Crystal Meth Anonymous program, his progress in dealing with "the issues that caused him to use," his intense desire to succeed in recovery this time, his faith, and his work skills and ability to be a productive member of society. (Sent. Tr., p.8, L.13 – p.9, L.22.) Scott Flinn, an addict with 14 years of sobriety behind him, discussed the change in Mr. Patterson's attitude and he suggested that such change is critical to the recovery process and, thus, bodes very well for Mr. Patterson. (*See* Sent. Tr., p.10, L.6 – p.11, L.3.) Larry Featherston, Jr., Mr. Patterson's boss at Home Heating & Air Condition, offered a glowing assessment of Mr. Patterson, describing Mr. Patterson's forthrightness about his addiction, and

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[5] The only requirement that Mr. Patterson failed to fully satisfy was the obligation to pay all Court Compliance Program fees. (R., p.89.)
[6] The letters are attached to the PSI.

explaining what an asset Mr. Patterson was to the company. (Sent. Tr., p.11, L.14 – p.12, L.4.) Mr. Featherston described Mr. Patterson at different times as a "tremendous worker" and an "awesome worker."[8] (Sent. Tr., p.11, L.14 – p.12, L.4.) Finally, Cindy Bennett, Mr. Patterson's sister, spoke. (Sent. Tr., p.12, L.7 – p.13, L.10.) Just as her cousin's letter had done, she described her brother as "an excellent father when he's not on drugs," commenting that "[h]e's just there for his kids, and that's what they need." (Sent. Tr., p.12, L.14 – p.13, L.10.) She also explained that the children's mother was not a part of their lives and, a result, she (Ms. Bennett), a single parent herself, was struggling to care for Mr. Patterson's children in addition to her own. (Sent. Tr., p.12, L.20 – p.13, L.3.)

Despite Mr. Patterson's history of addiction, the role that it played in the present offenses, his desire to break the chains of that addiction, and his recent successes in beginning to do so, and despite the importance of Mr. Patterson to his sister and, most importantly, his children, the district court denied defense counsel's request for a "rider" (Sent. Tr., p.23, Ls.15-18), *i.e.*, a period of retained jurisdiction.[9] Instead, the district

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[7] Mr. Patterson has two children, a boy and a girl. (PSI, p.7.) They were twelve and eleven years old, respectively, at the time of Mr. Patterson's sentencing. (PSI, p.7.)

[8] Mr. Featherston's remarks in open court were consistent with what he told the pre-sentence investigator about Mr. Patterson. On that earlier occasion, Mr. Featherston had described Mr. Patterson's job performance as "awesome" and had written as follows: "He's very punctual & knows his job. He's an asset to our installation team. We are hoping he will remain a full time employee." (PSI, p.9.) Notably, this is consistent with what another former employer had recalled about him (even though he had not worked for her since 1999)—she described him as a "good employee" and a "hard worker," and had noted that "the crews liked him on job sites for his quality work." (PSI, p.9.)

[9] The district court ruled that a rider was not an option given the "mandatory minimum" of I.C. § 37-2739B. (Sent. Tr., p.31, L.3 – p.33, L.10.) The district court further ruled, however, that, even if it did have discretion to grant Mr. Patterson a rider, it would not do so. (Sent. Tr., p.33, L.11 – p.36, L.25.)

court imposed two concurrent unified sentences of fifteen years, with five years fixed. (R., p.108; Sent. Tr., p.37, Ls.3-11.) In doing so, the district court acknowledged, at least to a certain extent, the devastating impact its sentencing decision would have on Mr. Patterson's children, but concluded, apparently, that the "greater good" of "sending a message" to drug addicts outweighed that impact. (*See* Sent. Tr., p.35, L.14 – p.37, L.11.)

On June 17, 2008, the district court entered its written judgment of conviction. (R., pp.104-10.) Ten days later, on June 30, 2008, Mr. Patterson filed a timely notice of appeal. (R., pp.119-21.) On appeal, Mr. Patterson contends that the district court abused its sentencing discretion by imposing upon him a sentence which is excessive given any view of the facts. He further contends that the district court erred in ruling that neither a rider, nor a suspended sentence, is legally permissible upon imposition of a "fixed minimum" sentence under I.C. § 37-2739B, and that this Court may, in fact, remand his case with an order that he be granted a rider. Mr. Patterson respectfully requests that this Court do just that, so that he may have an opportunity to earn a chance at probation. Alternatively, he requests that this Court reduce the indeterminate portion of his sentence or remand his case for a new sentencing hearing.

ISSUES

1. Did the district court abuse its sentencing discretion by imposing upon Mr. Patterson a sentence which is excessive given any view of the facts?

2. May a defendant receive retained jurisdiction, or a suspended sentence, upon imposition of a "fixed minimum" sentence pursuant to I.C. § 37-2739B?

ARGUMENT

I.

The District Court Abused Its Sentencing Discretion By Imposing Upon Mr. Patterson A Sentence Which Is Excessive Given Any View Of The Facts

Mr. Patterson asserts that, given any view of the facts, his concurrent unified sentences of fifteen years, with five years fixed, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). Mr. Patterson does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Patterson must show that, in light of the governing criteria, the sentence is excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992)). The governing criteria are derived from the four objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)).

This Court reviews the length of the entire sentence in order to determine whether the sentence is reasonable. *State v. Oliver*, 144 Idaho 722, 725, 170 P.3d 387, 391 (2007).

As noted above, Mr. Patterson is a drug addict, and the district court specifically found that his addiction factored prominently in the perpetration of the present offenses. (Sent. Tr., p.34, Ls.19-21.) Both of these are facts which the Idaho courts have long considered mitigating circumstances counseling toward lesser sentences. *See, e.g., State v. Nice*, 103 Idaho 89, 91, 645 P.2d 323, 325 ("[T]he trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem."). In addition, not only has Mr. Patterson voiced his acceptance of responsibility for his actions and his willingness to overcome his addiction,[10] but, as described above, he has actually "walked the walk" by voluntarily seeking out treatment, working hard to stay sober, and meeting with a great deal of success in doing so. This is another well-established mitigating factor which counsels toward a lesser sentence. *See, e.g., State v. Shideler*, 103 Idaho 593, 595, 651 P.2d 527, 529 (1982) (noting that "since the incident and incarceration pending hearing, he has markedly changed his dependency on prescription medication, with great improvement in his mental attitude and stability," and holding that this factor, among others rendered the defendant's sentence excessive).

[10] Mr. Patterson told the pre-sentence investigator that his actions were "stupid" and that he is willing to accept responsibility for them. (PSI, pp.3, 10.) He went on to explain that he recognizes that he was foolish to think he could overcome his addiction on his own, that he needs, and is willing to accept support from his church, professional treatment providers, and his sponsor. (PSI, pp.3, 10.) Finally, he has made it clear that he is committed to changing his life. (PSI, p.10.)

In light of these facts, and looking at Mr. Patterson's case as a whole, it is clear that his concurrent sentences of fifteen years, with five years fixed, are excessive. The four objectives of criminal punishment are not well-served by warehousing Mr. Patterson for at least the next five years; society will be best served if Mr. Patterson is treated and allowed to become a contributing member as soon as possible. Indeed, prison may very well hamper Mr. Patterson's recovery (which is especially tragic in this case because he was doing so well prior to his sentencing hearing) and, thus, may actually increase the risk to society. Moreover, while the district court was clearly very concerned with both general and specific deterrence when it sentenced Mr. Patterson to prison (*see* Sent. Tr., p.35, L.18 – p.36, L.5), one must seriously question the district court's logic. With all due respect to the district court, it was naive to believe that a prison sentence in this case will have any impact whatsoever on addicts who, because of the nature of their addictions, lack the ability to make decisions that are in their best long-term interests.

In light of the foregoing, Mr. Patterson asks this Court to hold that the district court's sentence represents an abuse of discretion, and to vacate that sentence. He requests that this Court remand his case with an order that he be granted a rider or, in the alternative, that it reduce the indeterminate portion of his sentence or remand his case for a new sentencing hearing.

II.

A Defendant May Receive Retained Jurisdiction, Or A Suspended Sentence, Upon Imposition Of A "Fixed Minimum" Sentence Pursuant To I.C. § 37-2739B

As noted, Mr. Patterson requests that, in the event that this Court concludes that the district court abused its sentencing discretion by imposing a unified sentence of

fifteen years, with five years fixed, this Court remand the case with an order that Mr. Patterson be granted a rider. This request raises the question of whether a rider is even legally permissible in this case. Mr. Patterson contends that it is, and that the district court erred when it ruled otherwise.

As noted, Mr. Patterson pled guilty, not only to the two charged offenses, but also to one of the four charged sentencing enhancements—one of the two enhancements arising out of his prior drug conviction. That sentencing enhancement provides, in pertinent part, as follows:

> **37-2739B. Fixed minimum sentences in drug cases.** . . .
>
> (b) Any person who is found guilty of violating the provisions of section 37-2732(a)(1)(A), Idaho Code, or of any attempt to conspiracy to commit such a crime, may be sentenced to a fixed minimum term of confinement to the custody of the state board of correction, which term shall be at least five (5) years and may extend to life, for each of the following aggravating factors found by the trier of fact:
>
> > (1) That the defendant has previously been found guilty of or convicted of a violation of section 37-2732(a)(1)(A), Idaho Code, or of an attempt or conspiracy to commit such a crime, or an offense committed in another jurisdiction which, if committed in this jurisdiction, would be punishable as a violation of section 37-2732(a)(1)(A), Idaho Code, or as an attempt or conspiracy to commit such an offense.
> >
> > . . .
>
> (c) . . . During a fixed minimum term of confinement imposed under this section, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service. Each fixed minimum term imposed shall be served consecutively to the others, and consecutively to any minimum term of confinement imposed for the substantive offense.

I.C. § 37-2739B. Notably, the Idaho Court of Appeals has held that, despite the statute's use of the word "may" instead of "shall," section 37-2739B is mandatory. *State v. Ayala*, 129 Idaho 911, 918-19, 935 P.2d 174, 181-82 (Ct. App. 1996).

Prior to Mr. Patterson's sentencing hearing, he filed a Sentencing Memorandum arguing that section 37-2732B did not foreclose the possibility of him receiving a rider. (R., pp.75-84.) His argument was that, even if section 37-2732B is mandatory, in the sense that it requires the district court to impose the minimum fixed sentence (as the Court of Appeals held in *Ayala*), nothing in that provision requires the district court to *order that sentence into execution.* (R., pp.75-84.) He compared section 37-2732B to I.C. § 19-2514 and argued that, under the rule of lenity, section 37-2732B should not be read to impose a harsher penalty than its plain language would dictate. (R., pp.75-84.)

At Mr. Patterson's sentencing hearing, the district court heard arguments on whether a rider was permissible under section 37-2739B. (*See* Sent. Tr., p.4, L.24 – p.5, L.16, p.14, L.23 – p.19, L.2, p.23, L.15 – p.24, L.17.) Ultimately, although the district court made it clear that it was not inclined to grant a rider anyway, it sided with the State, ruling that section 37-2739B does *not* permit the district court to retain jurisdiction. (*See* Sent. Tr., p.31, L.3 – p.33, L.16, p.36, Ls.3-5, p.37, L.24 – p.38, L.3.) However, the district court did concede that this is an area of the law that is less than clear, and it encouraged Mr. Patterson to seek appellate review of the issue. (Sent. Tr., p.37, Ls.20-24.)

Mr. Patterson now contends that the district court's ruling was in error because, in fact, nothing in section 37-2739B precludes a district court from imposing a fixed minimum sentence and either retaining jurisdiction (with the possibility of later suspending the sentence and placing the defendant on probation) or immediately suspending the sentence and placing the defendant on probation. In other words, even

if section 37-2739B requires the district court to impose a fixed minimum sentence, nothing in that section requires the district court to order that sentence into execution.

As defense counsel below observed, a look at Idaho's persistent violator statute, I.C. § 19-2514, is instructive. That statute is worded similarly to section 37-2739B in that it provides that a person convicted of his or her third felony "shall be sentenced to a term . . . for not less than five (5) years and said term may extend to life." I.C. § 19-2514. And that statute has been interpreted to allow the sentencing court to suspend the imposed sentence and place the defendant on probation. *State v. Harrington*, 133 Idaho 563, 566-67, 990 P.2d 144,147-48 (Ct. App. 1999). The Court in that case held that "[w]here there has been no legislative action declaring a mandatory minimum term of imprisonment, thusly canceling a court's power to suspend sentences, such power to suspend should be preserved." *Id.* at 566 n.5, 990 P.2d at 147 n.5. Therefore, under the rule of lenity, which dictates that ambiguities in statutes must be resolved in favor of the defendant, the persistent violator statute could not be construed as requiring a mandatory minimum sentence where the Legislature did not expressly call for it. *Id.*

Notably, section 37-2739B, and its analoge, Idaho's persistent violator statute, differ markedly from Idaho's true mandatory minimum requirements, which explicitly state that the district court does not have discretion to suspend imposition of sentence or grant the defendant a rider. *See, e.g.*, I.C. §§ 19-2520G (imposing a five-year mandatory minimum sentence for certain repeat sex offenders, and specifically stating that "[a] court shall not have the power to suspend, withhold, retain jurisdiction, or commute a mandatory minimum sentence imposed pursuant to this section");

37-2732B(a) (*imposing various mandatory minimum* fixed sentences for drug trafficking, and specifically stating that "adjudication of guilt or the imposition or execution of sentence shall not be suspended, deferred, or withheld"). When one compares section 37-2739B the persistent violator statute to the true mandatory minimums provided for under Idaho law, it becomes clear that, had the Legislature intended to prohibit sentencing judges from granting riders or suspending sentences under the former statutes, it would have said so. Since the Idaho Legislature did not say so in drafting section 37-2739B, sentencing courts imposing the fixed minimum sentences provided for *therein retain their discretion to grant defendants riders and suspend their* sentences. Accordingly, this Court should hold that the district court erred in ruling that it had no discretion to grant Mr. Patterson a rider in this case.

CONCLUSION

For the foregoing reasons, Mr. Patterson respectfully requests that this Court vacate his sentence and remand his case with an instruction that he be granted a rider and, *thus, given an opportunity to earn a chance to be placed on probation.* Alternatively, if this Court determines that a rider is not possible in this case, he requests that this Court reduce the indeterminate portion of his sentence, or that it find that his current sentence is excessive and remand his case for a new sentencing hearing.

DATED this 14th day of January, 2009.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of January, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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